LIBRARY
PREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
JUL 26 1968
JOHN F. DAVIS, CLERK

No. 220

In the
Supreme Court of the United States

OCTOBER TERM, 1968.

IRVING SHAPIRO,

Petitioner,

vs.

LEE T. SHAPIRO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

SAMUEL A. RINELLA
One North LaSalle Street
Chicago, Illinois 60602
Attorney for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Statement 1

Reasons for Denial of the Writ 3

Conclusion 6

CITATIONS OF AUTHORITY

Cases

Airline Stewards and Stewardesses Ass'n v. Quinn, 35 Ill.2d 106, 219 N.E.2d 499 4

Allen v. Georgia, 166 U.S. 138 5

Bozarth v. Bozarth, 399 Ill. 259, 77 N.E.2d 658 4

Burns v. Ohio, 360 U.S. 252 4

District of Columbia v. Clawans, 300 U.S. 617 4

Douglas v. California, 372 U.S. 353 4

Eisler v. United States, 338 U.S. 189 5

Griffin v. Illinois, 351 U.S. 12 4

Hovey v. Elliott, 167 U.S. 409 5

In Re Curtis' Petition, 240 Fed. Sup. 475 4

McKane v. Durston, 153 U.S. 684 3

National Union of Marine Cooks and Stewards v. Arnold, et al., 348 U.S. 37 ..... 3, 4

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

No. 220

IRVING SHAPIRO,

Petitioner,

vs.

LEE T. SHAPIRO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Lee T. Shapiro, respondent herein, files herewith her Brief in Opposition to the Petition of Irving Shapiro, petitioner, for the issuance of a Writ of Certiorari to review the judgments of the Appellate Court of Illinois, First Judicial District, entered in this cause on November 13, 1967, and November 28, 1967.

STATEMENT

The causes herein involved had their inception in the filing on December 7, 1961, of the respondent's Complaint for Separate Maintenance, followed on June 22, 1962, by the filing of a Complaint by the respondent for the Par-

tition of real property. (R. 15, 166) The causes were consolidated. Thereafter the partition matter was disposed of by a summary decree for partition entered on July 27, 1962, (R. 312) by a decree of sale, entered on December 4, 1962, (R. 363) and by decree approving report of sale entered January 16, 1963, (R. 396-397). The question of separate maintenance was resolved by a Decree entered in favor of the respondent on September 22, 1966, more than five years subsequent to the filing of the suit (R. 899-908). These decrees comprise the subject matter of Appeal No. 51903 in the Appellate Court of Illinois, First District. Appeal 52918 was from an order entered December 30, 1966, requiring the payment by the petitioner to respondent of attorneys' fees and costs to defend the former appeal (R. 1076B).

REASONS FOR DENIAL OF WRIT

We submit that a careful examination of the Petition in this cause fails to reveal the existence of any question proper for federal adjudication. The petitioner begins with the gratuitous assumption that he was denied a right of appeal, whereas the record distinctly shows:

(1) That he was afforded such right,
(2) That he availed himself of this right, and
(3) That he so temporized and delayed in the prosecution thereof that the matter eventuated in a dismissal of the appeal. (Petition, Appendix A), in a refusal to reconsider the dismissal (Petition, Appendix B), in the denial by the Supreme Court of Illinois for leave to appeal (Petition, Appendix C), and in the denial of a motion for reconsideration of that order (Petition, Appendix D).

It is conceded in the petition (page 17), that no showing is made or could be made that the petitioner has been treated differently from anyone comparably situated, a showing which is distinctly required under the holding in *National Union of Marine Cooks and Stewards* v. *Arnold et al.* (1954), 348 U.S. 37.

The petition further ignores the well recognized rule of law that right to an appeal has never been, and is not now, a necessary element of due process (*National Union of Marine Cooks and Stewards* v. *Arnold et al.*), (1954), 348 U.S. 37, 43, where the court said:

> "While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process."

This followed a earlier holding in *District of Columbia* v. *Clawans* (1937), 300 U.S. 617, 627, and in *McKane* v. *Durston* (1894), 153 U.S. 684, 687. In the *McKane* case, one who

had been convicted of a crime punishable by fine and imprisonment in a state court applied for, and was denied, bail under a statute which provided absolutely therefor in cases punishable by a fine, and left it to the discretion of the court in cases involving imprisonment. This court said, at 153 U.S. pages 687 and 688:

> "If he applied for bail, and bail was denied, the action of the court was not the subject of review because the granting or refusing bail was made by the statute matter of discretion. . . . But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances, are matters for each state to determine for itself."

The principle that an appeal is not a matter of due process has been lately followed in *In re Curtis' Petition* (1965), District Court, Eastern District of Missouri, Eastern Division 240 Fed. Supp. 475, 485.

The cases cited by the petitioner in support of his position are not applicable to the case at bar. *Airline Stewards and Stewardesses Association* v. *Quinn,* 35 Ill. (2nd) 106, 219 NE (2nd) 499, decides only that denial of leave to substitute a party, where that denial would have the effect of barring an appeal, was erroneous. *Bozarth* v. *Bozarth,* 399 Ill. 259, 77 N.E. (2nd) 658, 659, holds only that failure to file in apt time, pursuant to Illinois appellate procedure, the praecipe and transcript of record does not affect the jurisdiction of the court; and, although the court elected to decide the case on the merits, it clearly stated that failure to follow procedural rules might be grounds for the dismissal of an appeal, thereby further vitiating the present petitioner's position under the rule set out in *National Union of Marine Cooks & Stewards* v. *Arnold et al.,* (1954) 348 U.S. 37. *Burns* v. *Ohio,* 360 U.S. 252, 257, *Griffin* v. *Illinois,* 351 U.S. 12, 17-18, and *Douglas*

v. *California*, 372 U.S. 353, were all decided upon one aspect or another of the proposition that, where a procedure for the taking of an appeal had been established, it constituted a denial of due process to make the actual prosecution of such an appeal, dependent upon the financial status of the appellant, who, in each of the three instances, lacked money to pay for the production of a required transcript or to engage counsel. In *Hovey* v. *Elliott*, 167 U.S. 409, it was held to be a denial of due process where the *trial* court had stricken the answer of a defendant and refused to receive evidence on his behalf on the theory that he stood in contempt of court. *Allen* v. *Georgia*, 166 U.S. 138, and *Eisler* v. *U.S.*, 338 U.S. 189, dealt with instances in which an appealing defendant had either escaped from custody pending appeal, or had left the country and was no longer amenable to the jurisdiction. In the former case, the Supreme Court of Georgia dismissed a pending writ of error; and in the later the cause was stricken from the docket of this court.

The theory of the petitioner amounts in substance to a claim that he is entitled to prosecute an appeal at his leisure, free of any inhibition or limitation in the form of procedural rule, and that when the appellate court no longer agrees that he has exercised due diligence, he may raise the shield of due process and equal protection of the laws. The theory is as disingenuous as it is novel; and if it is to be resorted to, it should have been supported by authorities, as we believe we have shown it was not. Between the entry on September 22, 1966, of the decree appealed from and the dismissal of the appeals concerned, more than a year had elapsed; the case stood still unbriefed on either side; and the Appellate Court of Illinois may well have been justified in concluding that the appellee (respondent here) was being denied the benefit either of

finality of her decree or expeditious prosecution of an appeal therefrom. In the face of the granting to the petitioner here of six motions for an extension of time, it can hardly be said that the Appellate Court of Illinois acted precipitately or that the petitioner was not afforded every reasonable opportunity to put his legal house in order before it.

CONCLUSION

We submit that under the prior decisions of this court, the discretion of the Appellate Court of Illinois in dismissing the petitioner's appeals afforded him no grounds for complaint of denial of due process or of equal protection of the law, that the discretion of that court was soundly and judiciously exercised, and that that court should not be disturbed in its exercise of that discretion.

We accordingly submit thaat the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL A. RINELLA
Attorney for Respondent